JD(SF)–71-03
Duluth, MN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

NORTH STAR MARINE OPERATORS, INC.,
Respondent

and **18-CA-16147**

JOHN WILLIAM RADOSEVICH,
An Individual

David Biggar, Esq.,
for the General Counsel
A. Blake MacDonald, Esq.,
for the Respondent
John W. Radosevich,
Charging Party

SUPPLEMENTAL DECISION [1]

Albert A. Metz, Administrative Law Judge. The issue presented in this compliance case is the backpay due to John W. Radosevich. On September 9, 2002, Judge William J. Pannier issued his decision *North Star Marine Operators, Inc.*, JD-94-02, finding that the Respondent had unlawfully discharged Radosevich because of his union activities. On October 24, 2002, the National Labor Relations Board (Board) issued its Decision and Order in this case directing that the Respondent shall, in pertinent part, make Radosevich, whole for any loss of earnings and other benefits suffered as a result of discrimination against him, with interest as computed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987). The Board's decision was enforced on April 7, 2003, by the United States Court of Appeals for the Eighth Circuit.

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[1] This matter was heard at Duluth, Minnesota on June 24, 2003.

The Respondent reinstated Radosevich to employment on September 28, 2002, but he was discharged a second time on November 20, 2002. Radosevich was again reinstated by the Respondent on April 30, 2003. The Region issued a complaint in case 18-CA-16680 challenging the second discharge and the discrimination against him during his employment after September 28. That matter was heard seriatim with the present compliance case. My decision in Radosevich's second discharge case issued this same date and found that the Respondent had unlawfully discriminated against him because of his union and protected concerted activities. (JD(SF)-75-03).

I. BACKGROUND

The Respondent's business consists of providing services for large vessels arriving at the ports of Duluth, Minnesota, and Superior, Wisconsin. The Lake Superior shipping business is seasonal and usually begins during the month of April and concludes in December. During the shipping seasons since 1962 Respondent has provided tying and untying services for vessels and also operates a launch boat that transports personnel and mail between shore and ships.

Radosevich returned to work on September 28, and worked until his second discharge on November 20. The Respondent and Radosevich reached an agreement with regard to the amount of backpay due Radosevich prior to his reinstatement and he was paid that money on March 7, 2003. The backpay period, therefore, encompasses only the period between Radosevich's reinstatement and his second termination. During this period Radosevich only performed the work of tying ships. He was not assigned any untie or launch boat duties during the backpay period.

A dispute arose as to the amount of backpay due to Radosevich. On April 29, 2003, the Regional Office issued a compliance specification setting forth the Government's position. The Government alleges that the Respondent failed to fully reinstate Radosevich to his former position employment by denying him the duties of untying ships and serving on the crew of Respondent's launch boat. The General Counsel asserts that the Respondent's owner, Richard Amatuzio, exercised his superior contractual seniority in an effort to discriminate against Radosevich by unlawfully restricting his work assignments after he was reinstated on September 28, 2002. Additionally, the Government argues that Radosevich was unlawfully denied the opportunity to perform launch boat work.

The Respondent duly filed its answer to the specification denying it was responsible for any backpay liability because Radosevich:

1. Was reinstated to his former position and was given all of the work he was entitled to under the Respondent's collective bargaining agreement with the International Longshoremen's Association (Union).
2. He is not entitled to untie ships by reason of his seniority.
3. Is not entitled to duties involving ship launches because he has not passed the required U. S. Coast Guard drug test.
4. He "worked for a non-union competitor of the Respondent's."

5. The year 2000 is not an appropriate year to calculate work available to Radosevich because the Respondent's owner, Richard Amatuzio, a union member, was ill during the entire year and thus not available to perform his more senior work, and,
6. To give Radosevich priority of ship unties and boat launching would deprive another union member, Gary Butler, of his right to work under the collective-bargaining agreement.

The Respondent's answer did not offer an alternate year, backpay computation or formula upon which Radosevich's backpay should be based.

II. THE BACKPAY FORMULA AND THE 2000 SHIPPING SEASON RECORDS

The Regional Office's Compliance Officer, Roger Czaia, testified that he based Radosevich's gross backpay calculations on his average earnings during the year 2000. Czaia chose this method because 2000 was the only year for which the Respondent was able to produce its payroll records, it took into consideration the seasonal nature of Respondent's business, and it was the last full year before Radosevich was terminated. The Region's backpay formula also used percentages of the work that various individuals did and thus takes into consideration Respondent's argument that it serviced fewer ships in 2002 than it had in previous years.

Czaia determined that Radosevich had performed 92% of the work of untying vessels and 22% of the work of crewing Respondent's harbor launch boat during the 2000 shipping season. Using these calculations, Czaia then calculated the total amount of untie work and boarding party work available during the backpay period, and multiplied those figures by 92% and 22% respectively. The resulting backpay amount totaled $2,266.49. The Respondent's answer offered no alternative formula, figures or amounts that disputed the calculations. See, ***Board's Rules and Regulations***, Section 102.56(b)("… if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.")

Respondent contends that the year 2000 is not a proper year for determining backpay, as Amatuzio had health problems during the year. Thus, it is argued that Radosevich worked more than he would have normally had Amatuzio been healthy. Compliance Officer Czaia gave uncontroverted testimony that he discussed this matter with the Respondent and its counsel and they argued that the records of the 1999 shipping season would be a more accurate portrayal of the backpay liability as Amatuzio was not as ill and allegedly worked more in that year. The Respondent, however, latter reported to Czaia that the records for that year were lost and they were not produced to the Compliance Officer. Thus, the 2000 shipping season records were the only ones that were available for the Region to use in making the backpay computation until shortly prior to the hearing.

Immediately before the hearing in this case, pursuant to a Government subpoena, the Respondent finally did turn over the 1999 shipping season records to the General Counsel. Czaia testified that he first saw the 1999 records on the day before the hearing.

Amatuzio admitted that in 1999 the Respondent serviced 122 ships and of that number he only untied one vessel. Amatuzio conceded that Radosevich untied the other 121 ships in 1999 -- more than 99% of the untie work. Amatuzio also admitted that he *tied up* approximately 80% of those same 122 ships. Thus, apparently poor health was not a deterrent for Amatuzio performing work in 1999. These admissions weigh against the Respondent's argument that the year 2000 was not an appropriate basis for backpay calculations because of Amatuzio's poor health. The net result of the examination of the 1999 records is that if the backpay calculations were based on those records, instead of the year 2000 documentation, Radosevich would be entitled to a greater amount of backpay.

The General Counsel bears the burden of proving the amount of gross backpay due in compliance proceedings. ***Florida Tile Co.***, 310 NLRB 609 (1993); ***Arlington Hotel***, 287 NLRB 851, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989). In many cases, it is difficult to determine the precise amount of backpay owed. When such difficulty arises, the Board may adopt whatever formula "attains just results in diverse, complicated situations." ***Phelps Dodge v. NLRB***, 313 U.S. 177, 198 (1941); ***NLRB v. Seven-Up Bottling Co. of Miami, Inc.***, 344 U.S. 344, 346-347 (l953). In discharging the Government's burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. ***National Labor Relations Board v. Kartarik, Inc.,*** 227 F.2d 190, (8th Cir. 1955); ***Ironworkers Local 378***, 213 NLRB 457, 458 (1974), citing ***NLRB v. Brown & Root, Inc***., 311 F. 2d 447, 452-3 (8th Circuit 1963). The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result. ***NLRB v. Overseas Motors***, 818 F.2d 517 (6th Cir. 1987); ***Kansas City Refined Helium Co.***, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). It is axiomatic that ". . .[a] backpay formula which approximates what discriminates would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." ***La Favorita, Inc.***, 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995).

The burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. ***Minette Mills, Inc.***, 316 NLRB 1009, 1010 (1995); ***Florida Tile***, 310 NLRB 609 (1993); ***NLRB v. Brown & Root, Inc.,*** 311 F. 2d 447, 454 (8th Cir. 1963). As the respondent is the wrongdoer who caused the discriminatee's initial unemployment, any ambiguities, doubts, or uncertainties are resolved against the respondent, the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination. ***Florida Tile Co.***, supra, at 610; ***Ryder System***, 302 NLRB 608 and fn. 4 (1991), enfd. 983 F.2d 705 (6th Cir. 1993).

I find that the Respondent offered no probative evidence that successfully disputed using work performed in the year 2000 as the basis for calculating the backpay due in the year 2002. As noted, the Respondent did not offer any formula or method of backpay computation different from that used by the Compliance Officer to compute the backpay due Radosevich. I find that the Region's use of the 2000 shipping season records, the General Counsel's formula and the calculations used to establish Radosevich's backpay were a reasonable basis upon which to formulate his backpay. ***Regional Import & Export Trucking Co.***, 318 NLRB 816, 821 (1995); ***Bridgeway Oldsmobile***, 294 NLRB 858, 860 (1989), enfd. 933 F.2d 1015 (9th Cir.

1991)(Reasonable for Compliance Officer to assume that discriminatees' earnings during the backpay period would have been the same as their earnings prior to their discharge.)

III. AMATUZIO'S EXERCISE OF SENIORITY

Under the terms of the collective-bargaining agreement between the Respondent and the Union, Amatuzio is number one on the seniority list and Radosevich is number three. Respondent contends that Amatuzio could, thus, properly exercise his seniority to perform untie work during the backpay period. Since only two persons are needed to untie a ship, Amatuzio and Gary Butler, number two on the list, would perform the untie when Amatuzio chooses to exercise his seniority. When Amatuzio chooses not to exercise his seniority, Butler and Radosevich untie the ship. Respondent argues that Amatuzio was merely exercising his seniority during the backpay period when he untied all of the ships and, thus, Radosevich is not entitled to be paid for any untie work.

The Government argues, however, that the issue is not whether Amatuzio had the seniority, but rather, whether he used that seniority in order to discriminate against Radosevich because he exercised his rights under Section 7 of the Act.

The Respondent's 1999 records show that Amatuzio exerted his seniority to untie only 1 out of 122 ships that the Respondent served. As noted above, Radosevich did 92% of the unties in 2000. The Respondent asserts that because Amatuzio's health was restored in the 2002 shipping season he exercised his seniority to do unties during that season just as he always had in prior seasons. In 2002 Radosevich was reinstated and his backpay period ran between September 28 and November 20. During that period Amatuzio wielded his seniority and he and Butler untied every ship Respondent served. The periods before and after the backpay period show that Amatuzio did not commonly untie ships -- prior to August he had not untied one. Starting in August he untied 3 of 20. In September Amatuzio untied 2 of 8. In October he untied 21 of 21 ships; in November he untied 19 of 19; and in December, after the backpay period, he untied only 2 of 15 ships. Thus nearly all of the ships Amatuzio untied were between September 28 and November 20, the period when Radosevich was reinstated. After Radosevich had been fired a second time in November 2002 Amatuzio only untied 2 of the 15 ships. Butler and the number 4 man on the seniority list, Tim Rachuy, untied the rest.

I find that the Government has demonstrated that Amatuzio's selective exercise of his seniority in 2002 was designed to unlawfully preclude Radosevich untie work. As more fully set forth in my decision issued this date in the unfair labor practice case, I found that the Respondent violated Section 8(a)(1), (3), and (4) by Amatuzio discriminatorily using his seniority as a weapon against Radosevich's rightful opportunity for work. I affirm that decision here and find that the Respondent unlawfully denied Radosevich work during the backpay period.

IV. LAUNCH BOAT WORK

Radosevich worked on the launch boat for many years prior to his discharge in April of 2001. The Respondent contends that he was ineligible to continue that work during the backpay period because he had not passed a U. S. Coast Guard drug test. The Respondent presented no

evidence that Radosevich had never taken such a test. Additionally the Respondent presented no evidence that he was told he had to take a drug test to work on the launch boat, that such a test was required of Radosevich, or that he was asked to take a drug test and refused. As the Respondent presented no evidence in support of this argument it failed to meet its burden of showing a diminution of Radosevich's backpay. I find that the Respondent's Coast Guard defense has no merit.

V. RADOSEVICH' S WORK FOR A NON-UNION COMPANY

Radosevich performed some work at various times for Sea Service, a nonunion employer, including a number of years before his discharge in 2001. Amatuzio testified that he recalled someone from the Union had told him at some unspecified time that they thought it better that he use a union member on his launch boat. It is unclear how such a statement, even if made, would preclude the Respondent from assigning such work to Radosevich. Further clouding Respondent's assertion is Amatuzio's admission that the Respondent regularly hired Ed Montgomery as an employee. Montgomery is the owner of Sea Service, the non-union company that employs Radosevich.

John Reed, the President of the Union, testified that the Union is attempting to get Sea Service to sign a collective-bargaining agreement. Reed offered no testimony that Radosevich was prohibited by the Union's rules or otherwise from working for Sea Service or that the Union in anyway objected to his working for that company. Radosevich testified that the Union had never brought any complaints against him because he worked for Sea Service.

I find that the Respondent failed to establish that Radosevich was ineligible to perform the work on the launch boat during the backpay period. The Respondent did not meet its burden proving that Radosevich was required to take a drug test to work on the launch boat or that the Union had some how precluded him from working on that boat because of his work for a nonunion employer. I conclude that the Region's formula finding that Radosevich was entitled to backpay for work on the launch boat is reasonable and sustained by the record.

In sum, I reject all of the Respondent's defenses to the Compliance Specification and find that the Specification reasonably and accurately set forth the backpay due Radosevich. I, therefore, recommend the Board order the Respondent to pay Radosevich $2,188.61 uncompensated untie work and $77.88 for launch boat work as set forth in the Backpay Specification, plus interest to the date of payment.

Dated

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Albert A. Metz
Administrative Law Judge